IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 716 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

BAVAJI CHIMANGIRI NANUGIRI

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Appearance:

1. Criminal Appeal No. 716 of 1990
MR KC SHAH APP for appellant
MR HRIDAY BUCH FOR MR ND NANAVATI SR. ADVOCATE for Respondent

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CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 10/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. The respondent ('the accused' for short) was tried by the learned Additional Sessions Judge, Junagadh in Sessions Case No.91 of 1988 for commission of the alleged offences under Section 66 (1) (b) of the Bombay Prohibition Act ('the Act' for short) and Section 20 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) arraigned on the charge of possessing 10 tables of charas each one wrapped in separate ten packets which were found from the pocket of his pantaloon when he was trapped on the basis of the information received by Bachu Zina, Head Constable of Una Police Station, District Junagadh, P.W.3.

2. At the end of the trial, the accused was found not guilty to the offence with which he was charged. Resultantly, he was acquitted vide judgment and order dated May 30, 1990 recorded in Sessions Case No. 91 of 1988 which has given rise to the present appeal at the instance of the appellant - State of Gujarat.

3. As per the prosecution case, P.W.3, Bachu Zina, Head Constable of Una Police station, District Junagadh received information that the accused was doing business of charas by selling the same by keeping with him. Therefore he called two persons to act as panchas and entrapped the accused in their presence. The accused was found in possession of ten tablets of charas which were wrapped in ten separate packets and kept in the pocket of the pantaloon. The said ten packets of charas were recovered in the presence of panchas and a panchnama was accordingly prepared whereupon separate paper slips bearing signatures of panchas were affixed and on those slips seal was affixed. Thereafter the accused was arrested. On the basis of the aforesaid trap of the accused, a complaint against him was filed by Bachu Zina, Head Constable of Una Police Station for the alleged offenses under the Act and the NDPS Act. The said complaint was registered and thereafter he started the investigation. During the course of investigation he recorded statements of witnesses, muddamal contraband article - ten packets of charas was sent to FSL for chemical analysis and on receipt of the report as it was found that the muddamal article was charas, he filed the charge-sheet against the accused in the Court of learned JMFC, Una for commission of the alleged offences under the Act as well as the NDPS Act.

4. On committal the learned Additional Sessions

Judge framed charge against the accused. He pleaded not guilty to the same and claimed to be tried. Thereupon he was put to trial in Sessions Case No. 91 of 1988.

5. To prove the culpability of the accused the prosecution has examined in all three witnesses and also produced documents upon which heavy reliance was placed.

6. On appreciation, evaluation and analysis of the evidence on record, the learned trial Judge came to the conclusion that the prosecution has failed to establish the charge levelled against the accused as the Panchas have not supported the prosecution case and the investigating officer has not observed/complied with the statutory provisions contained in Sections 42 and 50 of the NDPS Act. Resultantly, he acquitted the accused of the offence with which he was charged.

7. We have heard Mr. K.C. Shah, learned APP for the appellant - State of Gujarat and Mr. Hriday Buch, learned advocate for the accused. We have also perused the memo of appeal, the impugned judgment and order, testimonial collections and the record and proceedings of the Sessions Case No. 91 of 1988 which have been called for from the Sessions Court while admitting the appeal.

8. On close scrutiny of the impugned judgment and order and the set of evidence, we find the following infirmities in the prosecution case which are not capable of being cured by any evidence led by the prosecution:

(i) Admittedly, Bachu Zina, Head Constable received information with respect to the contraband article charas and thereupon he arranged for trap and he entrapped the accused with contraband article. Thereafter he filed the complaint. It has also come in evidence that after filing of the complaint by Bachu Zina, Head Constable, he started investigation and during the course of investigation he recorded statements of the witnesses, sent the muddamal to FSL and thereafter filed the charge-sheet. Therefore there is no manner of doubt that he carried out the investigation and completed the same upon filing of the charge-sheet. In view of the provisions of Section 53 (2) of the NDPS Act he was not an officer-in-charge of the Police Station under the NDPS Act nor he was invested with the powers by the State Government because officers under the rank of PSI were not empowered to investigate into the case filed under the NDPS Act. This is a serious lacuna in the prosecution case which is fatal to the prosecution case.

(ii) Admittedly provisions of Sections 42 and 50 of the NDPS Act which are mandatory in nature have not been complied with. Issue that the non-compliance of provisions contained in Sessions 42 and 50 is fatal to the prosecution case is no longer res-integra in view of catena of decisions enunciated by the Supreme Court (See State of Punjab v. Balbir Singh (1994) 3 SCC 299 (ii) State of Punjab v. Baldev Singh (1999) 6 SCC 172.

On having perusal of the impugned judgment and order and the evidence, it is seen that the Head Constable - Bachu Zina has unequivocally admitted that he has not complied with the provisions of sections 42 and 50 of the NDPS Act which is fatal to the prosecution case.

(iii) On having perusal of the report of the FSL on the contraband article at Ex.12, it is seen that the chemical examiner in his report has mentioned only the final result but which are the tests carried out by him are not mentioned therein.

In this connection, it would be profitable to refer to the judgment of a Division Bench of this Court in the case of Mahmad Hanif Shaikh Ibrahim v. State of Gujarat, 1994 (2) GLR 1191. The Division Bench in the said judgment observed that before the evidence of Public Analyst can be safely accepted and relied upon to base the order of conviction and sentence, the Court must have an opportunity of its own to independently assess and appreciate the same on the basis of scientific tests, etc. Instead, if the Court is to surrender to any bare opinion of the Public Analyst, that can amount to abdication of its judicial function, relegating itself to mechanically record the order of conviction and sentence without doing anything else.

Applying the principles laid down by the Division Bench of this Court to the facts of the present case, in this case also only final result is mentioned without disclosing which are the tests carried out for reaching at the final conclusion. Therefore, this is also fatal to the prosecution case.

9. In view of the aforesaid state of affairs and having regard to the unsatisfactory nature of evidence led by the prosecution and the serious infirmities including nonobservance of the statutory provisions of sections 42 and 50 of the NDPS Act which we have referred to in earlier paragraphs of this judgment, it cannot be said that the learned trial Judge has committed any error

in acquitting the accused of the offences with which he was charged. We are in complete agreement with the finding, ultimate conclusion and resultant order of acquittal recorded by the learned trial Judge as in our view no other conclusion is possible except the one reached by the trial Judge.

10. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal, if other view is possible, then also the appellate court cannot substitute its own view by reversing acquittal into conviction, unless the findings of the trial court are perverse or contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable as held by Supreme Court in Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225. In the instant case, the learned APP has not been able to point out as to how the findings recorded by the learned trial Judge are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

11. In the case of Ram Kumar v. State of Haryana, AIR 1995 SC 280, Supreme Court has said that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379 of the Code are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal.

12. This is an acquittal appeal in which the court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by

the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court and in our view the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi v. Bigendra Chaudhari, AIR 1967 SC 1124 and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.

13. On over all appreciation of the evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned trial Judge for acquitting the accused. Suffice it to say that the learned trial Judge has given cogent and convincing reasons for acquitting the accused and the learned APP has failed to dislodge the reasons given by the learned trial Judge in order to convince us to take the view contrary to the one already taken by the learned trial Judge.

14. Seen in the above context, as this appeal lacks merit, deserves to be dismissed by confirming the judgment and order of acquittal which is impugned under the appeal.

15. For the foregoing reasons, the appeal fails and accordingly it is dismissed. As the accused is on bail, his bail bonds shall stand cancelled and surety is discharged.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)

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